STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1365
DOCKET NO. P-55, SUB 1366

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. P-55, SUB 1365		
In the Matter of Complaint for Anticompetitive Activity and Motion to Find Tariff Noncompliant or Suspend Tariff	)	ORDER DISAPPROVING PROPOSED TARIFF
DOCKET NO. P-55, SUB 1366	)	
In the Matter of Tariff Filing by BellSouth Telecommunications, Inc. to Establish Contract Rates for Switched Access Rate Elements	)	

BY THE COMMISSION: The proposed tariff, which was filed on May 24, 2002, is a special arrangement for a specific interexchange carrier (IXC) to be offered discounts of up to 35% over a five-year period on usage-sensitive and recurring revenue from various local switching and transport rate elements. Although this particular tariff provides contract terms for only one individual customer, BellSouth Telecommunications, Inc. (BellSouth) has committed to make similar contracts available to other IXCs. BellSouth discussed the contract offerings with other IXCs prior to filing the tariff.

AT&T Communications of the Southern States, Inc. (AT&T) initially raised some concerns over the proposed agreements because of the contract's heavy reliance upon growth in switched access minutes to provide the discounts and the anticipated effect of BellSouth Long Distance's (BSLD's) market entry. To provide more time for discussion between BellSouth and AT&T, BellSouth voluntarily extended the tariff's effective date from June 6, 2002 to June 28, 2002, but the parties were unable to reach an agreement on terms of a similar contract for AT&T.

The contract which is the subject of this filing requires the IXC to attain and maintain a 10% or greater growth in switched access minutes over a predetermined minimum usage level in order to be eligible for the maximum discount available under the contract. The larger percentage discounts are available only in the later years of the contract. If 110% of the minimum usage level is maintained in years one through five, the discount rises linearly from 15% discount in year 1 to 35% discount in year 5. No discount is provided in any year in which the switched access minutes do not exceed the minimum usage level. Lower percentage discounts are available in years 1 through 3 if the growth in switched access minutes is between 102% and 110% of the minimum usage level, but no discount is available in years 4 and 5 if the usage does not exceed the minimum usage level by 10% or more. At switched access usage levels greater than the minimum usage level but below 102% of the minimum usage level, only a 7% discount is available in year 1, and no discount is available in years 2 through 5. In all cases, the discount applies only to the eligible billing for usage in excess of the minimum usage level.

Although not specified in the tariff, the minimum usage level for this particular customer is based on the switched usage over an 18-month period prior to the agreement. This level is fixed for the life of the agreement.

This matter came before the Regular Commission Staff Conference on June 24, 2002. In its agenda item, the Public Staff stated that while it understands BellSouth's attempts to maintain or encourage growth in current levels of switched access usage, it is concerned about any anti-competitive effects the entry of BSLD would have on the other IXCs' ability to maintain or grow their switched access usage, and thus be eligible for discounts under similar contracts. Under the terms that BellSouth intends to apply for establishment of the minimum usage level, BSLD must be in the market 18 months prior to entering into a similar contract. While its usage would grow strongly during the first portion of that period, the usage would likely flatten during the latter half. The method used by BellSouth to determine the minimum usage level would incorporate all of this usage into a linear regression which would be used to extrapolate the usage expected for the next twelve months. The usage results for those twelve months would become the minimum usage level for the term of the contract.

The Public Staff stated that it had concluded that the 18-month period and the linear regression methodology which BellSouth would use for the establishment of the minimum usage level would tend to reduce the advantage or disadvantage that a new entrant, such as BSLD, would have, relative to the other service providers, in meeting the growth requirements of the contract. While other providers would have a disadvantage in attaining any growth in switched usage during the period immediately after BSLD enters the market, that period of negative growth for those carriers could eventually be used as part of the 18-month period used by BellSouth's methodology to establish a negative trend in usage that would translate to a lower than otherwise minimum usage level. Thus the BSLD entry could be used to establish favorable contract terms for other providers after BSLD's entry. This presumes that there will be an offering of this kind at that time, which is not guaranteed by the tariff as filed.

The Public Staff further stated that it believes that the tariff offers advantages to both BellSouth, in the form of continued or increased demand for switched access services, and the IXCs, in the form of reduced access costs, and that there is some potential for end users to benefit as a secondary result. The Public Staff asserted that, if the tariff is allowed to become effective under the conditions that it discussed, no party would be adversely affected.

According to the Public Staff, the Commission's approval of the tariff should therefore be conditioned upon:

1. Non-discriminatory offering of similar agreements to all IXCs;

2. Continuation of the offerings at least 24 months beyond the date of BSLD's entry into the North Carolina interLATA long distance market;

3. Systematic reliance upon the 18-month historical period and linear regression methodology to derive the minimum usage level for the next 12 months; (This means among other things that BSLD would not be eligible for the contract rates for at least 18 months after entry into the North Carolina interLATA market.); and

4. Neither the tariff nor the contracts enable BellSouth to violate the provision of its Price Plan which requires that no service be made available at below its long run incremental cost.

The Public Staff recommended that these conditions should be either incorporated into the generic portion of the tariff or included in the Commission's Order addressing this matter.

A number of other parties appeared at the Regular Commission Staff Conference and spoke for or against the proposal. The Commission issued an Order Suspending Tariff and Seeking Further Comments on June 25, 2002. The Commission also held in abeyance a complaint by AT&T on the same general subject matter filed in Docket No. P-55, Sub 1365. BellSouth and AT&T were requested to enter into further negotiations on the subject.

COMMENTS

BellSouth stated that the subject tariff was the product of negotiations between BellSouth and Sprint Communications Company (Sprint) but has filed it as a tariff to allow other IXCs to take advantage of it. It is not discriminatory, being available to all similarly situated IXCs. BellSouth noted that the price for switched access services has declined dramatically in the past two years. At the same time, IXCs have many alternatives to switched access service available to them. In February 2001, the Federal Communications Commission (FCC) granted BellSouth pricing flexibility in offering certain switched access services. The purpose of the tariff is to provide a financial incentive for IXCs to purchase and to increase their purchases of switched access from BellSouth. The tariff is structured in such a way that the greater the percentage of the increase over the baseline usage the greater the discount. Setting the discount based, in part, upon the percentage of increase allows both large and small IXCs to benefit financially. Specifically, the discount is based on the percentage of increase in services purchased multiplied by the volume of services purchased to the extent the purchased usage exceeds the baseline usage. Thus, if two IXCs increase their switched access by the same proportion, the IXC with the greater volume purchased will receive a greater discount. This will not discriminate against AT&T as a large IXC. By the same token, if a given IXC's purchase of switched access from BellSouth has declined over the past 18 months, this would be projected forward to arrive at a baseline usage figure lower than current usage. Therefore, to obtain a discount in the first year, that IXC would simply need to maintain its current usage. Admittedly, AT&T may not be able to avail itself of the discount if its switched access declined perpetually, but this result is within AT&T's control. AT&T's complaint against discrimination is simply that the proposal does not suit it. Even if AT&T chooses not to take advantage of the tariff, it is no worse off because it still benefits from declining switched access rates.

BellSouth stated that its discussions with AT&T were not fruitful. AT&T submitted a plan that in BellSouth's view would abandon the goal of retaining and growing usage. AT&T's proposal would benefit AT&T while carriers with less volume would receive less benefit. If the Commission desires, BellSouth stated that it would withdraw this tariff and negotiate individual contract service arrangements while continuing to negotiate with AT&T.

AT&T stated that the only way an IXC can ever take advantage of the switched access discount is by growing its volumes. The "what if" scenarios suggested by BellSouth which possibly might allow an IXC with declining volumes to obtain greater switched access discounts are remote. If BellSouth were truly and simply concerned with keeping traffic on its network, then logically it should be proposing discount arrangements for all, especially these IXCs with the largest, albeit declining, volumes. Both the FCC and the Texas Public Utility Commission have determined that switched access "growth tariffs", similar to the one at issue here, are unlawful because they improperly discriminate in favor of the BOC's low volume affiliated IXC company. AT&T is protesting another recent attempt of BellSouth to file a "growth tariff" at the FCC. Nor does BellSouth's proposal even qualify for contract service agreement (CSA) treatment, which is reserved for situations in which services are not otherwise available in tariffs or are necessary to meet competition. BellSouth, furthermore, has not demonstrated that the revised tariff benefits North Carolina consumers, nor has its revised tariff specified all the terms and conditions which may be specially negotiated between BellSouth and IXCs. It does not adequately explain its "only once" cancellation provision and it fails to comply with various requirements of Rule R9-4.

Sprint filed comments supporting the proposed tariff with the proposed revisions of the Public Staff. Sprint asked the Commission to approve the special arrangement tariff as modified by the Public Staff and to require BellSouth to file an appropriate general tariff applicable to all IXCs. The filing is not discriminatory because it is available to all IXCs.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

The Commission concludes that BellSouth's proposed tariff in this docket should be disapproved as not being in the public interest at this time. Inasmuch as this decision would render AT&T's complaint in Docket No. P-55, Sub 1365 moot, that complaint should be dismissed as well.

The ostensible reason for BellSouth's proposed tariff was to arrest what it perceives to be a decline in demand for a commodity called access services. If one wants to sell more of a product—or to maintain the sales of product for which substitutions are becoming more common—it makes sense to lower the price for the product. If one wants more revenues, one will attempt to sell more units, that is, to increase volume. BellSouth's approach is one that tends to reward those that increase their percentages of purchases of access services in preference to those who merely are increasing volume but not by such a high percentage. This has the effect of rewarding smaller IXCs with lower volumes but higher percentage increases of purchases (such as, eventually, BSLD) over larger IXCs with high volume who must strive mightily to increase the percentage of purchases at all (such as, for example, AT&T). The Commission does not view BellSouth's proposal—especially with the improvements suggested by the Public Staff—to be irrational or even necessarily unreasonably discriminatory in a legal sense. As has been noted many times, it would be available to any IXC which qualifies without distinction, and there is some logic in targeting IXCs who may seem to be most enthusiastic about purchasing one's product.

Nevertheless, it appears to the Commission that if the aim is to stimulate the volume of purchases (and, hence, revenue), it would better serve the public interest if the discounts offered were volume-based, instead of being based upon percentage increases over a baseline. After all, even a relatively modest percentage increase in the volume of purchases from a high-volume IXC could dwarf the increased volume coming from a low-volume IXC or a group of them. This would mean that much more revenue for BellSouth.

The Commission would therefore encourage BellSouth to experiment with volume-based discounts for access services that are not biased against high-volume IXCs. If two years from now, for example, BellSouth finds this to be unsatisfactory and if it has proof of this and that its percentage-based approach, or variation of it, is better, then the Commission will be willing to revisit the issue.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 13th day of August, 2002.

NORTH CAROLINA UTILITIES COMMISSION

Geneva S. Thigpen

Geneva S. Thigpen, Chief Clerk

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Chairman Jo Anne Sanford did not participate.